



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 19-00407
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

11/15/2019

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant failed to mitigate security concerns triggered by his marijuana use while holding a security clearance and his deliberate omissions about his drug use on multiple security clearance questionnaires. Eligibility for access to classified information is denied.

History of the Case

Applicant submitted security clearance applications (SCA) in March 2010, May 2015, February 2016, and March 2018. On March 15, 2019, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct). Applicant answered the SOR on April 1, 2019, and requested a hearing before an administrative judge (Answer). The Government sent an amended SOR to Applicant on June 10, 2019. The Government was ready to proceed on June 12, 2019. Applicant answered the amended SOR on June 20, 2019, and the case was assigned to me on August 15, 2019. On August 22, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 25, 2019. I convened the hearing as scheduled. Government Exhibits (GE) 1 through 6

were admitted without objection, and Applicant testified. DOHA received the hearing transcript (Tr.) on October 3, 2019, and the record closed.

Findings of Fact

Applicant, 29, is divorced, and he has one young son from a subsequent relationship. He received a bachelor's degree in December 2017, and he is currently in a master's degree program. Applicant served in the U.S. Army from August 2010 until he was honorably discharged in August 2016. Since September 2019, he has worked as a cyber-security analyst for a defense contractor. (Tr. 9-12)

Applicant admitted all of the allegations in the SOR and amended SOR. (Answer; Amended SOR; Tr. 15)

Applicant started using marijuana in 2006, while he was in high school. He continued to use marijuana until December 2009. Additionally, he used cocaine and used without a prescription various medications in 2009. In March 2010, Applicant completed his first SCA (2010 SCA), and he did not disclose any drug use. Applicant testified that he initially disclosed his history of drug use in his 2010 SCA. He was advised by his Army recruiter to change his 2010 SCA in order to be eligible to receive preferred positions in the Army. Applicant did not seek additional guidance regarding this issue, nor did he disclose his drug use during a subsequent interview with a government investigator. (Answer; GE 3 at 38; GE 5 at 8-9; GE 6 at 3; Tr. 20-22)

From 2010 until 2013, Applicant did not use marijuana and did not spend time with people who used marijuana. In April 2010 he received a top secret sensitive-compartmentalized information (SCI) security clearance. In June 2013, Applicant drank too much alcohol and chose to use marijuana with a stranger. Applicant did not report his June 2013 drug use to his command or security manager, because he knew he would there would be work-related consequences for using illegal drugs. (GE 4; GE 6 at 2-4; Tr. 23-24)

In May 2015, Applicant completed a second SCA (2015 SCA). He did not disclose his 2008 to 2009 and 2013 drug use, because he believed his 2010 SCA and 2015 SCA should be consistent. During the subsequent subject interview with a government investigator Applicant did not disclose: his history of drug use; his failure to disclose his drug use in his two SCAs; and his failure to disclose his drug use during his 2010 subject interview. (Answer; GE 2 at 35-36; GE 5 at 9; Tr. 24-26)

In September 2015, Applicant used marijuana while visiting a former Army friend. He did not report this use to his command or security manager, because he was concerned about the ramifications and repercussions on his career and security clearance. (GE 5; GE 6; Tr. 26, 54)

Applicant completed a third SCA in February 2016 (2016 SCA), and again, he did not disclose his history of drug use. (This SCA was not offered into evidence, but it is referenced in GE 6 at 2.) In June 2016, while still on active duty in the Army, Applicant

applied for a job with a defense contractor, who sponsored him for access to SCI. Applicant then underwent a polygraph examination with another government agency (AGA). During the pre-examination interview, Applicant disclosed using marijuana every day or every other day from August to December 2009. He also claimed that he unintentionally used marijuana one time in 2014, but this was the full extent of his drug use. The examiner told Applicant he did not pass the exam after the first round of questions. Applicant then disclosed his use of marijuana while holding a security clearance in 2013 and 2015. He also disclosed illegally using cocaine and prescription drugs without a prescription in 2009. In July 2016, the AGA denied Applicant SCI eligibility. (GE 5 at 9; GE 6; Tr. 27-32, 44-45)

Applicant was discharged from the Army in August 2016, and he received a 70%-disability rating from the Department of Veterans Affairs (VA). Applicant started using and purchasing marijuana in January 2017 due to chronic pain. He did not want to use traditional pain medication. From January 2017 until March 2017, he used marijuana every other day. Applicant stopped using marijuana in March 2017, to focus on his family responsibilities. (GE 5 at 3, 8; Tr. 32-35)

In August 2017, Applicant used marijuana one time after his best friend committed suicide in their home. In December 2017, Applicant was offered a position by defense contractor, contingent upon him securing a security clearance. He obtained a medical marijuana card in January 2018. He completed a fourth SCA in March 2018 (2018 SCA), and he disclosed using marijuana while holding a security clearance in June 2013 and September 2015. Applicant also indicated that he used marijuana every other day from early January 2017 to August 2017. (GE 1 at 40-41; GE 5 at 7-8; Tr. 36-41, 43)

Applicant started using marijuana again in July 2018. He started using marijuana again, despite seeking a security clearance, because there was no guarantee that he would obtain a clearance and he was in pain. Additionally, he believed his use was legal. Applicant did not consult with his sponsor as to whether medicinal use of marijuana was allowed, because he believed his marijuana use was legal. (GE 1; Tr. 41-45)

In his October 2018 subject interview, which he adopted in February 2019, Applicant disclosed that he intended to continue to use medical marijuana until he obtained a security clearance. He claimed that that the only drug he had ever misused was marijuana, and that he last used marijuana in October 2018. Applicant stopped purchasing marijuana in October 2018, due to the expense. Applicant's last drug test occurred while he was on active duty in the Army. The last time Applicant was around people who were using marijuana was during the summer of 2019. While at a friend's house, he was offered marijuana, but he did not use it. (GE 5 at 2, 8-9; Tr. 46-47, 50-52)

Applicant deployed to Jordan and Afghanistan while he was on active duty. He received two Army Commendation Medals and two Army Good Conduct Medals. According to Applicant, the two nights Applicant used marijuana while on active duty

were insignificant, and he does not consider himself to be a habitual marijuana user. (Tr. 48-50, 52-53)

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H: Drug Involvement and Substance Misuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any “controlled substance” as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Applicant’s admissions and the record evidence established the following disqualifying conditions under AG ¶ 25:

- (a) any substance misuse (see above definition);
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The burden shifted to Appellant to prove mitigation of the resulting security concerns. AG ¶ 26 provides conditions that could mitigate security concerns in this case:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used;
and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Appellant's decision to use illegal drugs, while he was on active duty and held a security clearance, cannot be considered a minor lapse in judgment, but rather a pattern of behavior that reflects his unwillingness to follow rules and regulations. Security clearance decisions are not limited to conduct during duty hours; off-duty conduct, especially where it reflects poor judgment, provides a rational basis for the government to question an appellant's security worthiness. (See, e.g., *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989)). Applicant's behavior showed a disregard for the law, regulations, and the fiduciary relationship he voluntarily entered into with the government.

Applicant used marijuana from 2006 to 2009, once in 2013, once in 2015, from January to March 2017, once in August 2017, and from July 2018 to October 2018. He used marijuana while he was on active duty in the Army and held a security clearance. Applicant did not report this use to his command or security manager, nor was it detected through urinalyses. He used marijuana in 2018, after he applied again for a security clearance. His claim that he did not realize his use was illegal was self-serving as he did not seek clarification from his sponsor.

Applicant was at a friend's party during the summer of 2019, and he was offered marijuana. He claimed that he has not used marijuana since October 2018; however, he has failed to be forthright and consistent with the government regarding his history of drug use since 2010. Despite completing multiple SCAs and subject interviews between 2010 and 2016, Applicant's drug use did not come out until he was confronted during his polygraph examination. Therefore, Applicant's assertions that he is drug free afforded little mitigation with respect to his drug use, and he did not establish mitigation under AG ¶¶ 26(a) and 26(b).

Guideline E: Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result

in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Applicant's admitted falsifications of his 2010 SCA and 2015 SCA, buttressed by the documentary evidence, established the following disqualifying condition under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

AG ¶ 17 describes conditions that could raise a security concern and be mitigating. Two are potentially applicable in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant failed to disclose his history of drug use in his 2010 SCA, 2010 subject interview, 2015 SCA, 2015 subject interview, and 2016 SCA. Although he did disclose some drug use during the pre-examination component of his 2016 polygraph examination, he also made false statements regarding his history of drug use. He claimed his marijuana use in 2014 was unintentional, which was not true. Additionally, he failed to disclose his intentional use of marijuana while holding a clearance and his misuse of cocaine and prescription medications. Finally, in his October 2018 subject interview, Applicant made the false claim that the only drug he had ever misused was marijuana.

Applicant made deliberate choices to keep the government in the dark regarding his behavior, raising the concern that he is unreliable and untrustworthy and calling into question his judgment and willingness to comply with rules and regulations. This concern has not been mitigated by the passage of time. Neither of the mitigating conditions apply in this case.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. I also considered Applicant's favorable character evidence.

Applicant has not carried his burden of showing that it is clearly consistent with the national security interests of the United States to grant him eligibility for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Drug Involvement:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Withdrawn
Subparagraphs 1.c – 1.d:	Against Applicant

Paragraph 2, Personal Conduct:

Against Applicant

Subparagraphs 2.a – 2.b:

Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security of the United States to grant or continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is denied.

CAROLINE E. HEINTZELMAN
Administrative Judge